

# Piracy – Does it give rise to a claim for General Average?

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*A vessel with cargo on board is being detained by pirates in Somalia and a ransom of US\$3m has been demanded by the hijackers for release of the vessel, its cargo and crew...*

Various issues have been arising following the recent dramatic increase in rate and scale of such pirate attack, one being the question:

Does piracy give rise to a claim for general average?

Answer can be found in Lowndes & Rudolf on The Law of General Average and York-Antwerp Rules, wherein an old authority, Hicks v Palington (1590) was quoted, holding that where cargo is voluntarily given up to pirates by way of composition, the sacrifice is a subject for general average contribution.

## **Essential Features of General Average**

The story of general average starts, as far as we know, some 2,500 or 3,000 years ago in the Eastern Mediterranean whilst we are not short of piracy stories throughout. The principle of general average was embodied in the Rhodian Law (about 2,500 years ago), which reads:

“If in order to lighten a ship, merchandise is thrown overboard, that which has been given for all shall be replaced by the contributions of all.”

The object of the general average system was to encourage ship masters and others who sailed with them to make exertions to attain safety whenever a peril threatened the common maritime adventure. The essential fairness of the system has been followed over many years and is now recognized as part of the law of the sea in all maritime countries. However, the laws of different countries have developed in different directions, there being variations in adjusting the general averages; hence the necessity of international uniformity of practice, which has been achieved by the almost universal practice of incorporating into the contract of affreightment a provision that general average shall be adjusted in accordance with the York-Antwerp Rules.

Rule A of the York-Antwerp Rules is a definition of general average and reads as follows:

“There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure.”

As will be noted, there are 5 essential features necessary to constitute a general average act and it is necessary for each of these 5 features to be present before a sacrifice or expenditure should be treated as general average:

1. There must be a COMMON ADVENTURE
2. The act must be for the COMMON SAFETY

3. The sacrifice or expenditure must have been VOLUNTARILY (INTENTIONALLY) made or incurred
4. The sacrifice or expenditure must be EXTRAORDINARY in kind
5. The extraordinary sacrifice or expenditure must be REASONABLY made.

### **Definition of Piracy**

Piracy is forcible robbery at sea, whether committed by marauders from outside the ship, or by mariners or passengers within it. The essential element is that they violently dispossess the Master, and afterwards carry away the ship itself, or any of the goods, with a felonious intent.

This is the definition of piracy given by Carver's Carriage of Goods, which was generally approved few court cases including Athens Maritime v Hellenic Mutual War (1992) ("The Andreas Lemos").

In the context of marine insurance, the term "piracy" must be interpreted in a business sense, which is not necessarily the same as its meaning under criminal law or to an international lawyer. In this connection, Rule no.8 of the Rules for Construction of Policy (under the Marine Insurance Act, 1906) provides that the term "piracy" includes passengers who mutiny and rioters who attack the ship from the shore.

From the foregoing, 3 main elements to define piracy can be identified:

1. The vessel must be at sea
2. There must be a robbery – taking or attempting to take property that does not belong to them
3. Force or the threat of force must be used.

### **Recognising General Average**

As noted in the above-mentioned case of Hicks v. Palington, in return for release of the vessel, its cargo and crew on board, property would be given to the pirates. However, in modern life, payment of a ransom is most common. In the recent Somalia cases, in addition to the ransom, there are other considerable ancillary costs incurred in respect of securing the release of the vessel and cargo, such as payments to a negotiation team, transporting the ransom, insuring the ransom money etc. as well as the initial search expenses.

These expenses can be admitted as general average if all the 5 essential features are present:

1. There is clearly a common maritime adventure.
2. The vessel and cargo being in the control of pirates are in a position of common peril, who may have scuttled the vessel or misappropriated either or both the vessel and cargo. It is suggested that the main threat may be to the crew, nevertheless by threatening the safety of the crew the operations of the vessel are compromised, putting the safety of vessel and cargo at risk. Accordingly, the cost of search and payment of a ransom including necessary ancillary costs in order to secure the safety of the ship and cargo are incurred for the common safety.
3. These expenses are not accidental in nature or inevitable and although there may often seem little other option available to the shipowner and the ransom payment is not favourable, it is still an expense voluntarily and intentionally made during a time of common peril in order to secure the safe release of the vessel and cargo. Whilst

the crew are coerced by the pirates, those who pay the ransom do so voluntarily as the best means of saving lives and property.

4. These expenses are extraordinary in kind, and not that which the cargo interest has a right to expect the shipowner to bear under the contract of affreightment.
5. The shipowner is required to act reasonably making efforts to re-take possession of the vessel, but whether the charges are properly and reasonably made or incurred is a question of fact to be judged by reference to what a prudent competent owner might do in light of all circumstances taking into account the risk of damage to the vessel and its cargo and the risk of death or personal injury to the crew. In this connection, it is essential for the shipowner to keep the other parties (e.g. charterers, cargo interests, insurers, P&I Clubs) informed throughout with their agreement being obtained whenever possible as each step is taken. Furthermore, "reasonable" implies "legal" and questions of legality need to be considered – see below.

It is worth noting that the expenses including crew wages and maintenance paid and fuel and consumed during the prolongation of the voyage occasioned by the vessel being hijacked by pirates steaming to escape detection and whilst being detained pending negotiations and release of the vessel fall outside general average, being excluded by Rule C of the York-Antwerp Rules which reads as follows:

"Demurrage, loss of market, and any loss or damage sustained or expense incurred by reason of delay, whether on the voyage or subsequently, and any indirect loss whatsoever, shall not be admitted as general average."

In addition, any damage to the vessel and/or its cargo done by the pirates deliberately or through neglect will not be made good as general average.

### **Contribution**

General average sacrifice and expenditure are to be borne by the different contributing interests upon the basis of values at the time and place when and where the adventure ends. That is to say, all property which is at risk at the time of the general average act will contribute. The contributing interests include the vessel (including bunkers and any freight at risk), cargo (including any freight at risk) and containers in the case of container carriers, but not human life (by reason of the impossibility of assessing them at a pecuniary value).

In a piracy case, ransom is often paid for the release of the vessel and its cargo as well as the crew and question arises as to whether a proportion of the ransom should be borne by the employer of the crew.

It is submitted that, following the authorities in salvage and sue & labour cases including *The Bosworth* (No.3) (1962) and *Royal Boskalis Westminster NV v Mountain* (1999), in circumstances where a ransom is paid for the release of the vessel, cargo and crew with no specific payment being identified and made for the saving of crew lives, the courts are not prepared to review the payment to apportion the payment between the saving of life and the saving of property, thus treating the whole payment made as being a payment for the objective of saving the vessel and its cargo.

Different considerations apply if a specific payment made can be identified for the release of the crew, in which case the shipowner would probably look to his P&I club for consideration to the argument that the ransom is a sue and labour charge incurred to avoid liability for death or injury to crew.

## **Legality**

As hinted earlier when considering allowance in general average for the ransom payment and enforcement of general contribution thereto from other parties to the common maritime adventure, an important element is the issue of public policy and of legality which can differ depending on jurisdictions.

Under English law, payment of a ransom is not illegal per se and, accordingly, can be admitted in general average, all 5 features being present in terms of Rule A of the York-Antwerp Rules as discussed earlier.

However, under modern anti-terrorism legislation, funding to support terrorism directly or indirectly is illegal. In this connection, it is submitted that there is little evidence to support the suggestion that ransom payments in the current Somalia piracy cases are finding its way to terrorist or political organisations to fund terrorist activities, there being generally the view that the Somalia piracy is for personal gain.

Different regulations will apply elsewhere. The legality may arise either by law of destination (which would govern the general average in the absence of express provision in the contract of affreightment) or by law of the domicile of the paying party. If paying a contribution is an illegal act then it will be unlikely that any right of contribution can be enforced.

## **Settlement**

Most shipowners in Hong Kong and Taiwan insure their vessels subject to Institute Time Clauses – Hulls 1/10/83 whilst and we have seen cargo largely covered by Institute Cargo Clauses (A) 1/1/82. Both sets of clauses provide for the insurance being subject to English law and practice with cover for piracy as an insured peril and general average (including salvage, sue & labour charges, etc.). In mainland China, PICC Hull Insurance Clauses 1/1/86 are commonly used, which provide for similar coverage. Ocean going vessels are largely entered with P&I club which normally covers the unrecoverable proportion of cargo or some other party's proportion of general average, which is unrecoverable solely by reason of the owner being in breach of the contract of carriage.

The responsibility for having an adjustment of general average prepared rests with the shipowner who will appoint an average adjuster seeking his professional advice on the many problems involved from the time he first hears that the ship has been missing or hijacked. Pending preparation of the adjustment, security will have to be collected from the concerned in cargo in the form of Average Bond by the cargo receiver in conjunction with an unlimited Average Guarantee by reputable insurer in lieu of cash deposit.

Under the adjustment of general average, the shipowner can recover under the policy on ship the ship's proportion of general average, reduced in respect of any under-insurance, and look to the cargo concerned for its contribution.

If unfortunately the cargo interest is able to decline contribution on the ground that either (a) the shipowner failed to exercise due diligence to provide a seaworthy vessel, i.e. breach of contract, or (b) payment of a ransom is illegal by the law of the domicile of the cargo interest, the shipowner will then look to the P&I club who will, under normal coverage, entertain case (a) but not case (b).

## **Conclusion**

In an opinion given by the world leading average adjusting firm, Richards Hogg Lindley conclude as follows:

“General Average is a recognised, respected and accepted way of dealing with sacrifice and expenditure incurred to safeguard and recover ships and cargo at sea. It is entirely natural that there should be concern that money paid to criminals for this same purpose should be allowed in General Average. However, the payment of a ransom complies with the defined tests for General Average and has the support of the courts.”

As reported in the press, there has been growing consensus that the ransoms in the circumstances are general average.

TCW/02/2009